

E-Filed 3/16/09

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ANGEL JESUS ALVAREZ,

Petitioner,

v.

ROBERT AYERS, JR., Warden,

Respondent.

Case Number C 06-5027 JF (PVT)

ORDER DENYING MOTION FOR
CERTIFICATE OF APPEALABILITY

[re: document no. 20]

On September 30, 2008, the Court dismissed the petitioner for writ of habeas corpus as time-barred and entered judgment for respondent. On October 29, 2008, Petitioner filed a motion for a certificate of appealability.

“When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel* 529 U.S. 473, 484 (2000).

In this case, Petitioner filed his federal habeas petition more than two years after the statute of limitations had expired. Petitioner argued for equitable tolling of the limitations period

1 based upon the conduct of his attorneys. The Court carefully reviewed Petitioner's allegations
2 and evidence and concluded that the alleged misconduct of counsel did not rise to the level of
3 extraordinary circumstances required for application of the equitable tolling doctrine. The Court
4 likewise carefully considered Petitioner's claim of actual innocence to determine whether his
5 constitutional claims should be considered on the merits notwithstanding the time bar. The Court
6 concluded that Petitioner had not made a colorable showing of actual innocence. Petitioner has
7 failed to demonstrate that jurists of reason would find it debatable whether these rulings were
8 correct. Accordingly, Petitioner's motion for a certificate of appealability is DENIED.

9 The clerk shall forward to the court of appeals the case file with this order. *See*
10 Fed. R. App. P. 22(b).

11 This order terminates Document No. 20.

12 IT IS SO ORDERED.

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15 DATED: 3/16/09

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18 JEREMY FOGEL
19 United States District Judge
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1 Copies of Order served on:

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